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No. 90-895

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

G. MURRAY TURNER, MULHALL, TURNER & HOFFMAN, formerly known as MULHALL, TURNER, HOFFMAN, CLAY & TRIPLETT - - Petitioner

versus

LEON E. JONES, SR. - - - - Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

WILLIAM T. WARNER
CONLIFFE, SANDMANN, GORMAN & SULLIVAN
621 West Main Street
Louisville, KY 40202
(502) 587-7711

[*Counsel of Record*]

N. SCOTT LILLY
First Assistant Jefferson County Attorney
1001 Fiscal Court Building
Louisville, KY 40202
(502) 625-6336

Co-Counsel for Respondent

WESTERFIELD-BONTE CO., 619 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

QUESTION PRESENTED FOR REVIEW

Has the Petitioner advanced any special or compelling reason for granting his Petition?

The Respondent respectfully answers and argues "no."

LIST OF PARTIES

Leon E. Jones, Sr., Chief
Jefferson County Kentucky Police Department
Louisville, Kentucky

One hundred ninety-three thousand, three hundred eighty-seven dollars and sixty-seven cents [In rem]

G. Murray Turner, Mulhall, Turner & Hoffman; formerly known as Mulhall, Turner, Hoffman, Clay, and Triplett

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No. 90-895

IN THE

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October Term, 1990

G. MURRAY TURNER, MULHALL, TURNER & HOFFMAN, formerly known as MULHALL, TURNER, HOFFMAN, CLAY & TRIPLETT - - *Petitioner*

v.

LEON E. JONES, SR., - - - - - *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Respondent herein, Leon E. Jones, Sr., respectfully prays that this Court deny the Petition for a Writ of Certiorari to review the order of the United States Court of Appeals for the Sixth Circuit entered in this matter on August 23, 1990.

OPINIONS BELOW

The August 23, 1990 order of the Court of Appeals for the Sixth Circuit, which is sought to be reviewed herein, is unreported and is reprinted in the Appendix to the Petition at pages 31 and 32. The June 7, 1988 Order and Memorandum Opinion of the United States District Court for

the Western District of Kentucky, is unreported and is reprinted in the Appendix to this Brief at pages 46a to 50a. The March 14, 1984 Opinion of the Jefferson County, Kentucky Circuit Court, and subsequent Amended Order entered May 8, 1984, adopted by the District Court, are both reprinted in the Appendix to this Brief at pages 39a to 43a.

CONSTITUTIONAL PROVISIONS AND STATUTES

The following are the constitutional provisions and statutes involved in the case:

The applicable portion of the Fifth Amendment to the Constitution of the United States provides that "No person shall be . . . deprived of life, liberty, or property, without due process of law;"

The applicable portion of the Fourteenth Amendment to the United States Constitution is set forth at page 7 of the Petition.

Section 2 of the Constitution of the Commonwealth of Kentucky provides that "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority."

Title 21, United States Code, Section 881 [as amended 1989], is reprinted in full at pages 18a to 24a of the Appendix to this Brief.

Section 218A.270, Kentucky Revised Statutes, [repealed effective July 13, 1984] is reprinted at pages 1-5 of the Appendix to the Petition and at pages 1a to 4a of the Appendix to this Brief. Section 218A.410 through .440, Kentucky Revised Statutes [effective July 13, 1984] are reprinted at pages 5a to 18a of the Appendix to this Brief.

STATEMENT OF THE CASE

This civil forfeiture action was commenced January 17, 1984 in the Jefferson County, Kentucky Circuit Court by Respondent's predecessor in office, E. G. Helm, Jr., in his official capacity as Chief of the Jefferson County Police Department. The Chief's Petition sought forfeiture of $193,387.67 seized on March 1, 1982 by Jefferson County Police Department Detectives in the course of executing State Court search warrants on premises occupied or leased by James William Ragland, his wife Mona Ragland, Robin Ragland, and Larry Suddeth. All four were arrested, and large quantities of illegal drugs found on the premises were seized, together with the money which is the subject of this action, and other evidence ultimately used to prosecute the Raglands and Mr. Suddeth.

A federal indictment was subsequently handed down naming some thirty defendants, including the Raglands and Mr. Suddeth, No. 82-0057-L, *United States* v. *James William Ragland, et al.* A summary of those criminal proceedings is set forth in Two District Court Memoranda and Orders dated January 21, 1985 and September 16, 1986, entered in a companion federal civil forfeiture case, No. C84-0735-L(B), *United States* v. *$75,900.00.*[1]

The $193,387.67, which is the subject of this case now before the Court on Petition for Writ of Certiorari, was held initially for use as evidence in the federal criminal prosecution but was subsequently released to an interest-bearing escrow account pending resolution of the case.

The Respondent Chief's Forfeiture Petition was filed in the Jefferson Circuit Court pursuant to Section 218A.270, Kentucky Revised Statutes ("KRS")[2] which declares for-

[1]Reprinted in the Appendix to this Brief at pages 25a to 32a.

[2]Included in the Appendix to this Brief, pages 1a to 4a.

feit to his Department money ". . . found upon the person or premise of [a] defendant, and which is involved in transactions in violation of Kentucky law regulating controlled substances."[3] It is undisputed that the offenses charged to the Defendants in the federal indictment also constituted violations of Kentucky law.

Before rendering judgment, the Jefferson Circuit Court directed that actual notice be given to all persons who could have any interest in the funds, and set a hearing on the forfeiture for March 12, 1984. After actually receiving that notice and in response thereto, the Petitioner here, G. Murray Turner, filed his Answer March 2, 1984 in the Jefferson Circuit Court action claiming an interest in and to the money by reason of a written assignment, appended to the Answer as an exhibit. Petitioner had been retained by the Raglands to represent them in the pending criminal actions, and he claimed that the assignment represented partial payment for his services. This assignment showed, on its face, that it was executed [and supposedly delivered] March 4, 1982 by the Raglands.

A plenary evidentiary hearing was convened in the Jefferson Circuit Court March 12, 1984, on the Merits of Respondent's Petition, and the claims of Turner. Petitioner Turner appeared by counsel, as did a representative

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[3]This specific statute was repealed by the Kentucky General Assembly effective July 13, 1984, but was re-enacted on the same date as KRS 218A.410 to .440 [included in the Appendix to this Brief, pages 5a to 17a]. The 1984 revisions essentially brought the Kentucky statute into virtual identity with the Federal drug forfeiture statute, 21 U.S.C. § 881(a) [included in the Appendix to this Brief, pages 18a to 24a]. After the 1984 revision, the Kentucky and United States statutes differ (in any substantial sense) only with regard to their respective provisions relating to required disposition *following* forfeiture; *compare* 21 U.S.C. § 881(e) and KRS 218A.420.

of the United States Internal Revenue Service ["IRS"], both asserting an interest in the money.[4]

With the consent of all the parties, including the representatives of Turner and the IRS who were present at the hearing, Jefferson Circuit Judge Edwin Schroering proceeded to take extensive proof on the issue of whether or not the funds at issue should be forfeited from the Raglands and Mr. Suddeth, reserving for later determination the claims or interests, if any, of Turner and the IRS in or to the money. Following that hearing, on March 14, 1984, Judge Schroering entered extensive Findings of Fact, Conclusions of Law, and an Order, declaring the money forfeited to Respondent's Department subject only to the claims of Turner and the IRS.[5]

After several continuances, a hearing concerning the claims of Turner and the IRS was finally scheduled and commenced by the State Court on December 3, 1984. The hearing was not concluded that day, and was passed by the Court to February 8, 1985 to complete the presentation of proof and arguments pending on these two claims.

That hearing was never concluded, because on December 27, 1984, the IRS filed a formal intervention and simultaneously removed the case to the United States District Court for the Western District of Kentucky.

Following discovery after removal, the District Court convened a status conference in the case to delineate the issues remaining to be litigated. At the conclusion of the

[4]The IRS had levied various liens and assessments against the assignors Ragland, et al., but had not at this point formally intervened in the case.

[5]An amended Order was entered May 8, 1984, making technical corrections to the March 14 Order. Both Orders are included in the Appendix to this Brief, pages 39a to 44a.

conference, the Court entered an Order October 16, 1987 directing counsel to attempt a stipulation of the issues to be decided by the Court.

The parties were not able to agree, and the District Court entered an Order March 2, 1988 setting forth the issues to be briefed by the parties. Neither of the Questions Petitioner presents for review in this Court were included among those issues and Petitioner did not move or request the District Court *at any point* to consider the issues he has presented to this Court.

In response to the District Court's Briefing order, the claimant IRS and the Respondent Chief of Police filed briefs on all issues as directed by the District Court.[6] The Petitioner failed to file *any* brief on the merits in the District Court, nor, as noted, did he ever file any exception or protest to the substance of the District Court Order directing the issues to be briefed and presented, either before *or* after judgment.[7]

On June 7, 1988, the District Court entered its Memorandum Opinion and Order dismissing the claims of the IRS and of Petitioner Turner and directing that the funds at issue in the case be forfeited to the Respondent. (See Appendix to this Brief, pages 51a to 56a.)

The Petitioner Turner took his appeal to the Sixth Circuit Court of Appeals on June 28, 1988. On August 23,

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[6]In its Memorandum Brief filed in the District Court, the IRS conceded the priority and superiority of the Chief's claim over that of the United States.

[7]The Respondent has previously argued that in view of the agreed method of litigation of this case in the District Court, to which the Petitioner never took exception, to Petitioner's failure to file a brief in the trial was tantamount to not appearing for trial; see Argument in this Brief, below, at pages 10-12.

1990, that court entered an order affirming the judgment of the District Court

SUMMARY OF ARGUMENT

1. The issues raised on appeal were never presented to, or decided by the District Court and they are not properly before this Court.

2. The purported 22 month delay in institution of forfeiture proceedings worked no prejudice on Petitioner, and he is in any case estopped from raising this issue by the judgment in a companion case.

3. Respondent's title to the disputed funds was perfected as of March 1, 1982, the funds having been lawfully seized on that date, and Petitioner's assignment having not been executed until March 4, 1982.

4. Petitioner was given full opportunity to present evidence and arguments in one full and one partial hearing held in the Jefferson Circuit Court, and following removal, in the U.S. District Court, and was thereby afforded due process of law.

ARGUMENT

I. An Appellate Court Should Not Consider an Issue Not Passed Upon Below.

At the outset, Respondent points out to the Court that the two Questions presented by the Petitioner in his Petition for Writ of Certiorari involve issues which were never presented to, or decided by the District Court. By failing to bring these issues before the District Court, Petitioner effectively waived his arguments and has no basis to assign as error that Court's failure to address the issues. They are, therefore, not properly before this Court on Petition for Writ; *Singleton* v. *Wulff*, 428 U.S. 106 (1976),

Sigmon Fuel Company v. *Tennessee Valley Authority*, [6th Cir. 1985] 754 F.2d 162, 164, and *Hammond* v. *Baldwin* [6th Cir. 1989] 866 F.2d 172, 175 n.1[8]

Without in any way waiving his argument in this regard, the Respondent will proceed to address the arguments in Petitioner's Petition as part of his own argument.[9]

II. Petitioner Is Estopped From Claiming Prejudice Through any Delay in the Institution of Forfeiture Proceedings.

Petitioner claims that the District Court failed to assess the impact of delay in the institution of forfeiture proceedings by Respondent's predecessor. As noted above, the Petitioner *never raised* this argument at any stage of the proceedings in either the state or federal trial courts.

Further, and conclusively, the same issues *were* raised by the same Petitioner against the United States in collateral forfeiture proceedings brought by the United States as to funds which were siezed by the United States *at the same time* and in *the same criminal proceedings* as the $193,387.67 involved in this case; see Order and Opinion of the United States District Court for the Western District of Kentucky, and the United States Court of Appeals for the Sixth Circuit in the case of *U.S.* v. *$75,900* included in the Appendix to this Brief at pages 34a to 44a.

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[8]Compare *Hormel* v. *Helvering*, 312 U.S. 552 (1940) and *United States* v. *Baker* [6th Cir. 1986] 807 F.2d 1315, 1321, holding that this general principle may not be applicable in situations where "manifest injustice would result"

[9]Both these questions, however, *were* presented by Petitioner to the Court of Appeals, together with a third argument—likewise not litigated in the District Court, but apparently abandoned here—to the effect that the forfeiture impermissibly involved attorney's fees.

III. Title to Subsequently Forfeited Property Is Vested in the Government at the Time the Property Is Found to Have Been Used Illegally.

Petitioner's second argument, alleging the unconstitutionality of former KRS 218A.270, the statute in effect at the time the money ultimately forfeited was seized, is difficult to understand, but nevertheless appears to be insubstantial.

The Petitioner argues that the Kentucky Statute does not incorporate a so-called "relation back" provision. The "relation-back" doctrine—universally recognized to have its origin in the very early history of our common law—provides that unless a legislature indicates otherwise, title to subsequently forfeited property is vested in the government at the time the property is found to have been used illegally; see e.g., *In re: Henderson Distilled Spirits*, 81 U.S. (14 Wall.) 44, 56-57 (1871); *Texas* v. *Donoghue*, 302 U.S. 284 (1937).

The importance of this point to the case is that the money at issue here was lawfully seized by the Respondent's officers March 1, 1982. Petitioner Turner's "assignment" was not even dated until *March 4*, 1982. Thus, the Order subsequently entered by Judge Schroering in the Jefferson Circuit Court action, adopted by the District Court in this case, perfected the Respondent's title in and to the disputed funds as of March 1, 1982. There was simply nothing to assign to Petitioner Turner as of March 4, 1984, and the District Court so concluded. The Court observed:

> "It is undisputed that the assignment, or security interest, whichever it may be determined to be, occurred after the seizure of the property while the

criminal defendants were incarcerated. The leading case of *United States* v. *Stowell*, 133 U.S. 1, 10 S.Ct. 244, 247 (1890), is dispositive:

> 'The next question to be determined is from what time the forfeiture takes effect. By the settled doctrine of this court, whenever a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited, the forfeiture takes effect immediately upon the commission of the act; the right to the property then vests in the United States, although their title is not perfected until judicial condemnation; the forfeiture constitutes a statutory transfer of the right to the United States at the time the offense is committed; and the condemnation, when obtained, relates back to that time, and avoids all intermediate sales and alienations, even to purchasers in good faith.'"

There are no reported Kentucky decisions construing either KRS 218A.270, or its successor statute KRS 218A.410 in this regard, but the general rationale underlying the well-established relationback doctrine is compelling in its obvious analogy and application to the case at bar, and the District Court so found in its June 7, 1988 Memorandum Opinion.

IV. Petitioner Was Afforded Due Process of Law in the Denial of His Claims Insofar as he Received Notice and an Opportunity to be Heard.

The Petitioner has consistently attempted to fashion an alternate underpinning to his arguments as to the unconstitutionality of KRS 218A.270, by pointing out that the Kentucky statute contains no provision for notice and hearing.

Whatever the applicable Kentucky statute or statutes may or may not provide, the record in this case clearly in-

dicates that one full, and one partial hearing was held in the Jefferson Circuit Court, *and* the Petitioner was given full opportunity to present evidence and arguments in the District Court, following removal. He declined to do so.

Further, the Petitioner, in his Petition, omits to point out the elemental principle that the operation of *any* statute, particularly a forfeiture statute, is subject to *constitutional* provisions relating to due process of law, whether or not explicitly recited in the statute; see e.g. Section 2 of the Kentucky Constitution, and the Fifth and Fourteenth Amendments to the United States Constitution. The record in this case clearly reflects that notice and hearing, together with every other element of due process, was accorded to the Petitioner [and all other actual or potential claimants], in fact and in law.

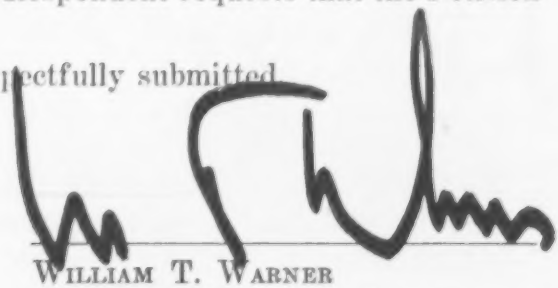
The forfeiture orders entered in the Jefferson Circuit Court, as adopted by the United States District Court following remand were suported by ample evidence of record, and were correct as a matter of law. The Petitioner, in his Petition, has offered no fact or argument or reference to the Record in this case which would even suggest, much less compel a contrary conclusion. The Sixth Circuit Court of Appeals was therefore correct in affirming the judgment of the District Court.

CONCLUSION

Both the District Court and the Court of Appeals were correct in ruling that all interest in the disputed funds were vested in the Respondent prior to the execution of the assignment to Petitioner. Petitioner had ample opportunity to assert his claim in hearings held in both state and federal

courts. Accordingly, Respondent requests that the Petition be denied.

Respectfully submitted,



WILLIAM T. WARNER
CONLIFFE, SANDMANN, GORMAN
& SULLIVAN
621 West Main Street
Louisville, KY 40202
(502) 587-7711
(Counsel of Record)

N. SCOTT LILLY
First Assistant Jefferson
County Attorney
1001 Fiscal Court Building
Louisville, KY 40202
(502) 625-6336
Counsel for Respondent

APPENDIX

KRS 218A.270

218A.270. Substances and property, subject to forfeiture — Procedure and exemptions. —(1) The following are subject to forfeiture:

(a) All controlled substances which have been manufactured, distributed, dispensed, possessed, being held or acquired in violation of this chapter;

(b) All raw materials, products and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this chapter;

(c) All property which is used, or intended for use, as a container for property described in paragraph (a) or (b) of this subsection;

(d) All conveyances, including aircraft, vehicles or vessels, which are used, or intended for use, to transport, or in any manner to facilitate the transportation, for the purpose of sale or receipt of property described in paragraph (a) or (b) of this subsection, but:

1. No conveyance used by any person as a common carrier in the transaction of business as a common carrier is subject to forfeiture under this section unless it appears that the owner or other person in charge of the conveyance is a consenting party or privy to a violation of this chapter;

2. No conveyance is subject to forfeiture under this section by reason of any act or omission established by the owner thereof to have been committed or omitted without his knowledge or consent;

3. A forfeiture of a conveyance encumbered by a bona fide security interest is subject to the interest of the secured party if he neither had knowledge of nor consented to the act or omission;

4. The forfeiture provisions of this paragraph shall not apply to any offense relating to marijuana.

(e) All books, records, and research products and materials, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this chapter.

(f) All moneys acquired from transactions involving property as described in paragraphs (a) and (b) of this subsection and found upon the person or premises of the defendant.

(2) Property subject to forfeiture under this chapter may be seized by any law enforcement agency upon process issued by any court having jurisdiction over the property. Seizure without process may be made if:

(a) The seizure is incident to an arrest or a search under a search warrant;

(b) The property subject to seizure has been the subject of a prior judgment in favor of the state in a criminal injunction or forfeiture proceeding based upon this chapter;

(c) The law enforcement agency has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(d) The law enforcement agency has probable cause to believe that the property was used or is intended to be used in violation of this chapter.

(3) Property taken or detained under this section shall not be subject to replevin, but is deemed to be in the custody of the law enforcement agency subject only to the orders and decrees of the court having jurisdiction over the forfeiture proceedings. When property is seized under this chapter, the law enforcement agency may:

(a) Remove the property to a place designated by it; or

(b) Take custody of the property and remove it to an appropriate location for disposition in accordance with the law.

(4) When property is forfeited under this chapter the law enforcement agency may:

(a) Retain it for official use;

(b) Sell that which is not required to be destroyed by law and which is not harmful to the public. The proceeds shall be used for payment of all proper expenses of the proceedings for forfeiture and sale, including expenses of seizure, maintenance of custody, advertising and court costs. The balance shall be paid to the state treasurer for deposit to the general fund.

(5) Controlled substances listed in Schedule I that are possessed, transferred, sold, or offered for sale in violation of this chapter are contraband and shall be seized and summarily forfeited to the state. Controlled substances listed in Schedule I, which are seized or come into the possession of the state, the owners of which are unknown, are contraband and shall be summarily forfeited to the state.

(6) Species of plants from which controlled substances in Schedules I and II may be derived which have been planted or cultivated in violation of this chapter, or of which the owners or cultivators are unknown, or which are wild growths, may be seized and summarily destroyed or forfeited to the state.

(7) The failure, upon demand by the law enforcement agency or its authorized agent, of the person in occupancy or in control of land or premises upon which the species of plants are growing or being stored, to produce an appropriate registration, or proof that he is the holder thereof, constitutes authority for the seizure and forfeiture of the plants.

(8) All substances, machinery or devices used for the manufacture, packaging, repackaging, or marking, and books, papers and records, and all vehicles owned and used by the seller or distributor for the manufacture, distribution, sale or transfer of substances in violation of KRS 218A.350 shall be seized and forfeited to the state. Substances manufactured, held, or distributed in violation of KRS 218A.350 shall be deemed contraband. (Enact. Acts 1972, ch. 226, § 29; 1978, ch. 124, § 1, effective June 17, 1978; 1982, ch. 419, § 3, effective July 15, 1982.)

KRS 218A.410 TO 440

218A.410. Property subject to forfeiture. —(1) The following are subject to forfeiture:

(a) Controlled substances listed in Schedule I that are possessed, transferred, sold, or offered for sale in violation of this chapter are contraband and shall be seized and summarily forfeited to the state.

(b) Controlled substances listed in Schedule I, which are seized or come into the possession of the state, the owners of which are unknown, are contraband and shall be summarily forfeited to the state.

(c) Species of plants from which controlled substances in Schedules I and II may be derived which have been planted or cultivated in violation of this chapter, or of which the owners or cultivators are unknown, or which are wild growths, may be seized and summarily destroyed or forfeited to the state. The failure, upon demand by the law enforcement agency or its authorized agent, of the person in occupancy or in control of land or premises upon which the species of plants are growing or being stored, to produce an appropriate registration, or proof that he is the holder thereof, constitutes authority for the seizure, and forfeiture of the plants.

(d) All substances, machinery or devices used for the manufacture, packaging, repackaging, or marking, and books, papers and records, and all vehicles owned and used by the seller or distributor for the manufacture, distribution, sale or transfer of substances in violation of KRS 218A.350 shall be seized and forfeited to the state. Substances manufactured, held, or distributed in violation of KRS 218A.350 shall be deemed contraband.

(e) All controlled substances which have been manufactured, distributed, dispensed, possessed, being held or acquired in violation of this chapter.

(f) All raw materials, products and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this chapter.

(g) All property which is used, or intended for use, as a container for property described in paragraph (e) or (f) of this subsection.

(h) All conveyances, including aircraft, vehicles or vessels, which are used or intended for use, to transport, or in any manner to facilitate the transportation, for the purpose of sale or receipt of property described in paragraph (e) or (f) of this subsection, but:

1. No conveyance used by any person as a common carrier in the transaction of business as a common carrier is subject to forfeiture under this section unless it is proven beyond a reasonable doubt that the owner or other person in charge of the conveyance is a consenting party or privy to a violation of this chapter;

2. No conveyance is subject to forfeiture under this section by reason of any act or omission established by the owner thereof to have been committed or omitted without his knowledge or consent;

3. A forfeiture of a conveyance encumbered by a bona fide security interest is subject to the interest of the secured party if he neither had knowledge of nor consented to the act or omission;

4. The forfeiture provisions of this paragraph shall not apply to any misdemeanor offense relating to marijuana.

(i) All books, records, and research products and materials, including formulas, microfilm, tapes and data which are used, or intended for use, in violation of this chapter.

(j) Everything of value furnished, or intended to be furnished, in exchange for a controlled substance in violation of this chapter, all proceeds, including real and personal property, traceable to such an exchange, and all moneys, negotiable instruments, and securities used, or intended to be used, to facilitate any violation of this chapter; except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by him to have been committed or omitted without his knowledge or consent. It shall be a rebuttable presumption that all moneys, coin and currency found in close proximity to forfeitable controlled substances, to forfeitable drug manufacturing or distributing paraphernalia, or to forfeitable records of the importation, manufacture or distribution of controlled substances, are presumed to be forfeitable under this paragraph. The burden of proof is upon claimants of personal property to rebut this presumption by clear and convincing evidence. The burden of proof is upon the law enforcement agency to prove by clear and convincing evidence that real property is forfeitable under this paragraph. (Enact. Acts 1984, ch. 101, § 1, effective July 13, 1984.)

218A.415. Procedure for seizure of property. — (1) Property subject to forfeiture under this chapter may be seized by any law enforcement agency upon process issued by any court having jurisdiction over the property. Seizure without process may be made if:

(a) The seizure is incident to an arrest or a search under a search warrant;

(b) The property subject to seizure has been the subject of a prior judgment in favor of the state in a criminal injunction or forfeiture proceeding based upon this chapter;

(c) The law enforcement agency has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(d) The law enforcement agency has probable cause to believe that the property was used or is intended to be used in violation of this chapter.

(2) Property taken or detained under this section shall not be subject to replevin, but is deemed to be in the custody of the law enforcement agency subject only to the orders and decrees of the court having jurisdiction over the forfeiture proceedings. When property is siezed under this chapter, the law enforcement agency may:

(a) Remove the property to a place designated by it; or

(b) Take custody of the property and remove it to an appropriate location for disposition in accordance with law. (Enact. Acts 1984, ch. 101, § 2, effective July 13, 1984.)

218A.420. Procedure for disposal of seized and forfeited property — Distribution of proceeds. — (1) All property which is subject to forfeiture under this chapter shall be disposed of in accordance with this section.

(2) All controlled substances which are seized and forfeited under this chapter shall be ordered destroyed by the order of the trial court. Property other than controlled substances may be destroyed on order of the trial court.

(3) When property other than controlled substances is forfeited under this chapter the law enforcement agency may with the approval of the trial court and subject to the provisions of KRS 218A.430:

(a) Retain it for official use;

(b) Sell that which is not required to be destroyed by law and which is not harmful to the public. The proceeds

shall be used for payment of all proper expenses of the proceedings for forfeiture and sale, including expenses of seizure, maintenance of custody, advertising and court costs. The balance, except as provided in KRS 218A.430, shall be paid to:

1. The county if the property was seized by the law enforcement agency of the county;

2. The city if the property was seized by the law enforcement agency of the city;

3. The state treasurer for the benefit of the Kentucky state police, except as provided in KRS 218A.430, if the property was seized by the Kentucky state police;

4. When money or property is siezed in a joint operation involving more than one (1) law enforcement agency the division of the money and property among the seizing agencies shall be made by the trial court. (Enact. Acts 1984, ch. 101, § 3, effective July 13, 1984.)

218A.425. Valuation of property retained for official use. — When seized property is retained for official use by law enforcement agencies under this chapter the value of the property shall be determined as follows:

(1) Vehicles shall be valued at their tax value;

(2) All other property shall be valued at its fair cash value by the property valuation administrator;

(3) Property shall be valued as of the time of sale by the law enforcement agency. (Enact. Acts 1984, ch. 101, § 4, effective July 13, 1984.)

218A.430. Maximum ceilings on proceeds. — (1) The first one hundred thousand dollars ($100,000) of money from forfeitures and property, including amounts paid pursuant to paragraph (3)(b)2 of KRS 218A.420, retained by law enforcement agencies of a city of the first class or

of an urban-county government shall be retained by the city or urban-county government and used solely for police purposes related to controlled substances. Any forfeitures in excess of this amount shall revert to the fund created in KRS 218A.435.

(2) The first one hundred thousand dollars ($100,000) of money from forfeitures and property including amounts paid pursuant to paragraph (3)(b)2 of KRS 218A.420, retained by county law enforcement agencies in counties containing a city of the first class shall be retained by the county and used solely for police purposes related to controlled substances. Any forfeitures in excess of this amount shall revert to the fund created in KRS 218A.435.

(3) The first one hundred thousand dollars ($100,000) of money from forfeitures and property including amounts paid pursuant to paragraph (3)(b)3 of KRS 218A.420, retained by the Kentucky state police shall be retained by the state police and used solely for police purposes related to controlled substances. Any forfeitures in excess of this amount shall revert to the fund created in KRS 218A.435.

(4) The first fifty thousand dollars ($50,000) of money from forfeitures and property, including amounts paid pursuant to paragraph (3)(b)1 or 2 of KRS 218A.420, retained by law enforcement agencies other than those specified in subsections (1) through (3) of this section shall be retained by the unit of government seizing such property and used solely for police purposes related to controlled substances. Any forfeitures in excess of this amount shall revert to the fund created in KRS 218A.435.

(5) Money seized and money for all property sold by any other seizing law enforcement agency pursuant to KRS 218A.420 shall be deposited in the fund created by KRS 218A.435.

(6) In calculating the forfeitures to be retained in subsections (1) through (4) of this section, the first forfeitures in any calendar year up to the amount specified in the applicable subsection shall be retained as provided in that subsection. (Enact. Acts 1984, ch. 101, § 5, effective July 13, 1984.)

218A.435. Trust and revolving fund. — (1) There is hereby created a trust and revolving fund in the executive branch of state government.

(2) The cabinet for human resources shall, in each fiscal year, receive the moneys deposited in the fund under KRS 218A.430, with such moneys to be used solely for the purpose of drug and alcohol abuse education, prevention and treatment. The moneys in this fund are intended to supplement any funds appropriated by the general assembly to the cabinet for human resources for drug and alcohol abuse education, prevention, and treatment efforts. (Enact. Acts 1984, ch. 101, § 6, effective July 13, 1984.)

218A.440. Statement with auditor of public accounts listing property seized. — (1) Each law enforcement agency seizing money or property pursuant to KRS 218A.415 shall, at the close of each fiscal year, file a statement with the auditor of public accounts, a detailed listing of all money and property seized and the disposition thereof. The listing shall identify all property so seized.

(2) Any agency failing to report as required by this section shall be liable to the state for the full value of all property and money so seized. The attorney general shall institute civil actions for recovery of money or property obtained or retained in violation of this section. (Enact. Acts 1984, ch. 101, § 7, effective July 13, 1984.)

TITLE 21, UNITED STATES CODE § 881

§ 881. Forfeitures

Property Subject

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.

(2) All raw materials, products, and equipment of any kind which are used, or intended for use, in manufacturing, compounding, processing, delivering, importing, or exporting any controlled substance in violation of this subchapter.

(3) All property which is used, or intended for use, as a container for property described in paragraph (1) or (2).

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2), except that—

(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this subchapter or subchapter II of this chapter; and

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State.

(5) All books, records, and research, including formulas, microfilm, tapes, and data which are used, or intended for use, in violation of this subchapter.

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(7) All real property, including any right, title, and interest in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(8) All controlled substances which have been possessed in violation of this subchapter.

Seizure Pursuant to Supplemental Rules for Certain Admiralty and Maritime Claims

(b) Any property subject to civil or criminal forfeiture to the United States under this subchapter may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property, except that seizure without such process may be made when—

(1) the seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;

(2) the property subject to seizure has been the subject of a prior judgment in favor of the United States in a criminal injunction or forfeiture proceeding under this subchapter;

(3) the Attorney General has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(4) the Attorney General has probable cause to believe that the property is subject to civil or criminal forfeiture under this subchapter.

In the event of seizure pursuant to paragraph (3) or (4) of this subsection, proceedings under subsection (d) of this section shall be instituted promptly.

Custody of Attorney General

(c) Property taken or detained under this section shall not be repleviable, but shall be deemed to be in the custody of the Attorney General, subject only to the orders and decrees of the court or the official having jurisdiction thereof. Whenever property is seized under any of the provisions of this subchapter, the Attorney General may—

(1) place the property under seal;

(2) remove the property to a place designated by him; or

(3) require that the General Services Administration take custody of the property and remove it, if practicable, to an appropriate location for disposition in accordance with law.

Other Laws and Proceedings Applicable

(d) The provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws; the disposition of such

property or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under any of the provisions of this subchapter, insofar as applicable and not inconsistent with the provisions hereof; except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this subchapter by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, except to the extent that such duties arise from seizures and forfeitures effected by any customs officer.

Disposition of Forfeited Property

(e) Whenever property is civilly or criminally forfeited or under this subchapter the Attorney General may—

(1) retain the property for official use or transfer the custody or ownership of any forfeited property to any Federal, State, or local agency pursuant to section 616 of Title 19;

(2) sell any forfeited property which is not required to be destroyed by law and which is not harmful to the public;

(3) require that the General Services Administration take custody of the property and dispose of it in accordance with law; or

(4) forward it to the Drug Enforcement Administration for disposition (including delivery for medical or scientific use to any Federal or State agency under regulations of the Attorney General).

The Attorney General shall ensure the equitable transfer pursuant to paragraph (1) of any forfeited property to the appropriate State or local law enforcement agency so as to

reflect generally the contribution of any such agency participating directly in any of the acts which led to the seizure or forfeiture of such property. A decision by the Attorney General pursuant to paragraph (1) shall not be subject to review. The proceeds from any sale under paragraph (2) any any moneys forfeited under this subchapter shall be used to pay all proper expenses of the proceedings for forfeiture and sale including expenses of seizure, maintenance of custody, advertising, and court costs. The Attorney General shall forward to the Treasurer of the United States for deposit in accordance with section 524(c) of Title 28 any amounts of such moneys and proceeds remaining after payment of such expenses.

Forfeiture of Schedule I Substances

(f) All controlled substances in schedule I that are possessed, transferred, sold, or offered for sale in violation of the provisions of this subchapter shall be deemed contraband and seized and summarily forfeited to the United States. Similarly, all substances in schedule I, which are seized or come into the possession of the United States, the owners of which are unknown, shall be deemed contraband and summarily forfeited to the United States.

Plants

(g)(1) All species of plants from which controlled substances in schedules I and II may be derived which have been planted or cultivated in violation of this subchapter, or of which the owners or cultivators are unknown, or which are wild growths, may be seized and summarily forfeited to the United States.

(2) The failure, upon demand by the Attorney General or his duly authorized agent, of the person in occupancy or in control of land or premises upon which such species of

plants are growing or being stored, to produce an appropriate registration, or proof that he is the holder thereof, shall constitute authority for the seizure and forfeiture.

(3) The Attorney General, or his duly authorized agent, shall have authority to enter upon any lands, or into any dwelling pursuant to a search warrant, to cut, harvest, carry off, or destroy such plants.

(h) All right, title, and interest in property described in subsection (a) of this section shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

(i) The filing of an indictment or information alleging a violation of this subchapter or subchapter II of this chapter which is also related to a civil forfeiture proceeding under this section shall, upon motion of the United States and for good cause shown, stay the civil forfeiture proceeding.

(j) In addition to the venue provided for in section 1395 of Title 28 or any other provision of law, in the case of porperty of a defendant charged with a violation that is the basis for forfeiture of the property under this section, a proceeding for forfeiture under this section may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought.

(Pub. L. 91-513, Title II, § 511, Oct. 27, 1970, 84 Stat. 1276; Pub. L. 95-633, Title III, § 301(a), Nov. 10, 1978, 92 Stat. 3777; Pub. L. 96-132, § 14, Nov. 30, 1979, 93 Stat. 1048; Pub. L. 98-473, Title II, §§ 306, 309, 518, Oct. 12, 1984, 98 Stat. 2050, 2051, 2075.)

1989 AMENDMENTS

§ 881. Forfeitures

(a) Subject property. [Introductory matter unchanged]

(1), (2) [Unchanged]

(3) All property which is used, or intended for use, as a container for property described in paragraph (1), (2), or (9).

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1), (2), or (9), except that—

(A) no conveyance used by any person as a common carrier in the transaction of business as a common carrier shall be forfeited under the provisions of this section unless it shall appear that the owner or other person in charge of such conveyance was a consenting party or privy to a violation of this title or title III;

(B) no conveyance shall be forfeited under the provisions of this section by reason of any act or omission established by the owner thereof to have been committed or omitted by any person other than such owner while such conveyance was unlawfully in the possession of a person other than the owner in violation of the criminal laws of the United States, or of any State; and

(C) no conveyance shall be forfeited under this paragraph to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge, consent, or willful blindness of the owner.

(5), (6) [Unchanged]

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any lot or tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

(8) All controlled substances which have been possessed in violation of this title.

(9) All listed chemicals, all drug manufacturing equipment, all tableting machines, all encapsulating machines, and all gelatin capsules, which have been imported, exported, manufactured, possessed, distributed, or intended to be distributed, imported, or exported, in violation of a felony provision of this title or title III.

(b) Seizure pursuant to Supplemental Rules for Certain Admiralty and Maritime Claims. Any property subject to civil forfeiture to the United States under this title may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for Certain Admiralty and Maritime Claims by any district court of the United States having jurisdiction over the property, except that seizure without such process may be made when—

(1)-(3) [Unchanged]

(4) the Attorney General has probable cause to believe that the property is subject to civil forfeiture under this title.

In the event of seizure pursuant to paragraph (3) or (4) of this subsection, proceedings under subsection (d) of this section shall be instituted promptly.

The Government may request the issuance of a warrant authorizing the seizure of property subject to forfeiture under this section in the same manner as provided for a search warrant under the Federal Rules of Criminal Procedure.

(c) Custody of Attorney General. Property taken or detained under this section shall not be repleviable, but shall be deemed to be in the custody of the Attorney General, subject only to the orders and decrees of the court or the official having jurisdiction thereof. Whenever property is seized under any of the provisions of this title, the Attorney General may—

(1), (2) [Unchanged]

(3) require that the General Services Administration take custody of the property and remove it, if practicable, to an appropriate location for disposition in accordance with law.

(d) Other laws and proceedings applicable. The provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws; the disposition of such property or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under any of the provisions of this title, insofar as applicable and not inconsistent with the provisions hereof; except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this title by such officers, agents, or other

persons as may be authorized or designated for that purpose by the Attorney General, except to the extent that such duties arise from seizures and forfeitures effected by any customs officer.

(e)(1) Disposition of forfeited property. Whenever property is civilly or criminally forfeited under this title the Attorney General may—

(A) retain the property for official use or, in the manner provided with respect to transfers under section 616 of the Tariff Act of 1930, transfer the property to any Federal agency or to any State or local law enforcement agency which participated directly in the seizure or forfeiture of the property;

(B) sell any forfeited property which is not required to be destroyed by law and which is not harmful to the public;

(C) require that the General Services Administration take custody of the property and dispose of it in accordance with law;

(D) forward it to the Bureau of Narcotics and Dangerous Drugs for disposition (including delivery for medical or scientific use to any Federal or State agency under regulations of the Attorney General); or

(E) transfer the forfeited personal property or the proceeds of the sale of any forfeited personal or real property to any foreign country which participated directly or indirectly in the seizure or forfeiture of the property, if such a transfer—

(i) has been agreed to by the Secretary of State;

(ii) is authorized in an international agreement between the United States and the foreign country; and

(iii) is made to a country which, if applicable, has been certified under section 481(h) of the Foreign Assistance Act of 1961 [22 USCS § 2291(h)].

(2)(A) The proceeds from any sale under subparagraph (B) of paragraph (1) and any moneys forfeited under this title shall be used to pay—

(i) all property expenses of the proceedings for forfeiture and sale including expenses of seizure, maintenance of custody, advertising, and court costs; and

(ii) awards of up to $100,000 to any individual who provides original information which leads to the arrest and conviction of a person who kills or kidnaps a Federal drug law enforcement agent. Any award paid for information concerning the killing or kidnapping of a Federal drug law enforcement agent, as provided in clause (ii), shall be paid at the discretion of the Attorney General.

(B) The Attorney General shall forward to the Treasurer of the United States for deposit in accordance with section 524(c) of title 28, United States Code, any amounts of such moneys and proceeds remaining after payment of the expenses provided in subparagraph (A), except that, with respect to forfeitures conducted by the Postal Service, the Postal Service shall deposit in the Postal Service Fund, under section 2003(b)(7) of title 39, United States Code, such moneys and proceeds.

(3) The Attorney General shall assure that any property transferred to a State or local law enforcement agency under paragraph (1)(A)—

(A) has a value that bears a reasonable relationship to the degree of direct participation of the State or local agency in the law enforcement effort resulting in the forfeiture, taking into account the total value of all property forfeited and the total law enforcement effort with respect to the violation of law on which the forfeiture is based; and

(B) is not so transferred to circumvent any requirement of State law that prohibits forfeiture or limits use or

disposition of property forfeited to State or local agencies.
(f) Forfeiture of schedule I or II substances. (1) All controlled substances in schedule I or II that are possessed, transferred, sold, or offered for sale in violation of the provisions of this title shall be deemed contraband and seized and summarily forfeited to the United States. Similarly, all substances in schedule I or II, which are seized or come into the possession of the United States, the owners of which are unknown, shall be deemed contraband and summarily forfeited to the United States.

(2) The Attorney General may direct the destruction of all controlled substances in schedule I or II seized for violation of this title under such circumstances as the Attorney General may deem necessary.

(g) [Unchanged]

(h) Property title, etc. vested in United States. All right, title, and interest in property described in subsection (a) shall vest in the United States upon commission of the act giving rise to forfeiture under this section.

(i) Stay of civil proceeding. The filing of an indictment or information alleging a violation of this title or title III, or a violation of State or local law that could have been charged under this title or title III, which is also related to a civil forfeiture proceeding under this section shall, upon motion of the United States and for good cause shown, stay the civil forfeiture proceeding.

(j) Venue. In addition to the venue provided for in section 1395 of title 28, United States Code [28 USCS § 1395], or any other provision of law, in the case of property of a defendant charged with a violation that is the basis for forfeiture of the property under this section, a proceeding for forfeiture under this section may be brought in the judicial district in which the defendant owning such property is found or in the judicial district in which the criminal prosecution is brought.

[k] (*l*) Functions. The functions of the Attorney General under this section shall be carried out by the Postal Service pursuant to such agreement as may be entered into between the Attorney General and the Postal Service.

(As amended Oct. 12, 1984, P. L. 98-473, Title II, Ch. III, Part B, § 306 Part C, § 309, Ch V, § 518, 98 Stat. 2050, 2051, 2075; Oct. 27, 1986, P. L. 99-570, Title I, Subtitle A, § 1006(c), Subtitle Q, § 1865, Subtitle U. § 1992, 100 Stat. 3207-7, 3207-54, 3207-59; Nov. 10, 1986, P. L. 99-646, § 74, 100 Sat. 3618; Nov. 18, 1988, P. L. 100-690, Title V, Subtitle C, Ch 1, § 5105, Title VI, Subtitle A, § 6059, Subtitle B, §§ 6074, 6075, 6077(a), (b), Subtitle H, § 6253, 102 Stat. 4301, 4320, 4323, 4324, 4363.)

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. C 84-0735-L(B)

UNITED STATES OF AMERICA - - - - - *Plaintiff*

v.

$75,900 IN U. S. CURRENCY - - - - - *Defendant*

MEMORANDUM AND ORDER—Entered January 21, 1985

This complaint for forfeiture, Title 28 U.S.C. Section 1355, is before the Court on the motion of certain parties in interest to dismiss or, in the alternative, for summary judgment.

The claimants were named as defendants in a multi-count indictment charging them and numerous other persons with drug-related offenses.

On or about March 1, 1982, a search warrant was executed on a lock box at First National Bank's Middletown branch. The box was leased to James and Mona Ragland, who were among the defendants named in the indictment. In the box was a number of envelopes with the names Larry Suddeth, Carson Lackhart, Royce Dossey, Steve Phillips and Robin Ragland on them. The envelopes contained a total of $75,900.00 which is the subject of this forfeiture action.

The thrust of claimants' motions is aimed at what they term is the "inordinate and unjustified" delay of 29 months between the seizure of the money and the commencement of this action.

In *United States* v. *$8,850.00*, ___ U.S. ___, 103 S.Ct. 2005 (1983), the Court utilized the test developed in *Barker* v. *Wingo*, 407 U.S. 514, 92 S.Ct. 2182 (1972), to determine the reasonableness of a delay in instituting forefeiture proceedings: "The *Barker* test involves a weighing of four factors: length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." ___ U.S. at ___, 103 S.Ct. at 2012.

In the case before this Court there were 30 defendants. As trial time approached those defendants before the Court, with two exceptions, changed their pleas of not guilty to pleas of guilty. The two exceptions were John Atnip and Jerry Tosh.

Atnip was tried and found guilty by the jury. After exhausting he appeals, he commenced the service of his sentence. At his trial the currency in question was introduced as evidence.

Tosh has managed to avoid his day of reckoning by delaying tactics involving his repeated changes of counsel. His case is presently set for trial February 26, 1985, and the Court is informed that the currency will be introduced as evidence at the trial.

This action was filed July 12, 1984, a week before one of Tosh's counsel changes. The United States argues that delay alone is not sufficient ground for dismissal, and the Court agrees.

The *$8,850* court[1] established flexible requirements for satisfying due process. It rejected the argument that delays alone mandated dismissal.

Applying the standards quoted above compels the conclusion that the reason for delay—the pending trials of

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[1]An unfortunate appellation to give to the Supreme Court of the United States. By analogy, this Court becomes a $75,900.00 court.

Atnip and Tosh as well as the possibility, however remote, of the apprehension of other defendants — satisfies the second test.

Whether claimants asserted their rights is arguable. There was a motion to suppress the evidence and return it to defendants in the criminal action. In denying the suppression motion, the Court failed to address specifically that portion of the motion seeking to have the money returned to the defendants. It would strain logic beyond limits to argue that the Court on the one hand would deny a suppression motion and on the other hand direct that the evidence be returned to defendants. We further note that claimants did not file an equitable action seeking an order compelling the filling of the forfeiture action for return of the seized property. The failure to use this remedy can be taken as some indication that claimants did not desire an early judicial hearing. *$8,850, supra,* __ U.S. __, 103 S.Ct. at 2014.

Finally, we note that claimants have made no showing of prejudice, such as the loss of witnesses or other important evidence.

The Court concludes that the United States has satisfied the criteria of *$8,850* and the motion to dismiss and the motion for summary judgment will be denied.

IT IS SO ORDERED this 21st day of January, 1985.

(s) Thomas A. Ballantine, Jr.
THOMAS A. BALLANTINE, JR.
United States District Judge

Copies to counsel

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. C 84-0735-L(B)

UNITED STATES OF AMERICA - - - - - *Plaintiff*

v.

$75,900 IN U. S. CURRENCY - - - - - *Defendant*

—Consolidated with—

No. C 84-1060-L(B)

UNITED STATES OF AMERICA - - - - - *Plaintiff*

v.

$8,000 IN U. S. CURRENCY - - - - - *Defendant*

MEMORANDUM AND ORDER—
Entered September 16, 1986

MEMORANDUM CONTAINING FINDINGS OF FACT AND CONCLUSIONS OF LAW

Following an undercover investigation of drug violations by a number of individuals, Jefferson County Police and Drug Enforcement Agents procurred search warrants for a house at 9110 Linn Station Road, the residence of James W. and Mona Ragland, and for a house at 8905 Thelma Lane, the residence of Larry Suddeth and Robin Ragland. The search warrants were executed simultaneously on March 1, 1982.

Among the items seized at Linn Station was over $13,000 in currency. At Thelma Lane currency in excess of $177,000 was seized.

On March 2, 1982, Special Agent Clifford Best of DEA procured and executed two search warrants for the search of safety deposit boxes at Middletown branch of the First National Bank and the Oxmoor branch of Citizens Fidelity Bank. At the First National Bank Special Agent Best seized $75,900 from the box rented to James Ragland and Mona Ragland. At Citizens Fidelity Bank Special Agent Best seized $8,000 from the box rented to Suddeth and Robin Ragland.

The grand jury returned a 27-count indictment against 30 defendants, charging a drug-related conspiracy and a number of substantive counts. Some of the defendants absconded and remain at large. A number of defendants entered pleas of guilty and two defendants, John Atnip and Jerry Tosh, were found guilty by a jury.[1]

On August 30, 1982, the Court denied Suddeth's motion to suppress and to return the property seized.

On May 3, 1984, the Court denied a renewed motion by the defendants for a return of the property seized.

On July 12, 1984, a complaint for the forfeiture of the $75,900 was filed by the United States and on October 12, 1984, a complaint for the forfeiture of the $8,000 was filed. The actions were later consolidated.

Movants appealed the order denying their motion for return of the property and the United States Court of Appeals for the Sixth Circuit remanded the case with directions to this Court to make findings of fact and conclusions of law in light of *Baker* v. *Wingo*, 407 U.S. 514, 92 S.Ct. 2182 (1972), as applied to *United States* v. *$8,850*, 461 U.S. 555, 103 S.Ct. 2005 (1983).

While the appeal was pending and before the issuance of a mandate by the Court of Appeals, this Court, by memorandum and order dated January 15, 1985, addressed

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[1]Tosh fled after his conviction and remains at large.

the *Barker* and *$8,850* issues. That memorandum and order is incorporated herein by reference.[2]

The *$8,850* court addressed the factors to be considered in applying the *Barker* test:

> "In applying the *Barker* balancing test to this situation, the overreaching factor is the length of the delay. As we said in *Barker*, the length of the delay 'is to some extent a triggering mechanism.' [407 U.S., at 530, 92 S.Ct. at 2192]. Little can be said on when a delay becomes presumptively improper, for the determination necessarily depends on the facts of the particular case. Our inquiry is the constitutional one of due process; we are not establishing a statute of limitations. Obviously, short delays—of perhaps a month or so—need less justification than longer delays. We regard the delay here—some 18 months—as quite significant. Being deprived of this substantial sum of money for a year and a half is undoubtedly a significant burden.
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> * * * *
>
> Pending criminal proceedings present similar justifications for delay in instituting civil forfeiture proceedings. A prior or contemporaneous civil proceeding could substantially hamper the criminal proceeding, which—as here—may often include forfeiture as part of the sentence. A prior civil suit might serve to estop later criminal proceedings and may provide improper opportunities for the claimant to discover the details of a contemplated or pending criminal prosecution. Compare Federal Rule of Civil Procedure 26(b) with Federal Rule of Criminal Procedure 16. In

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[2]For reasons not entirely clear, that memorandum and order was not brought to the attention of the Court of Appeals.

> some circumstances, a civil forfeiture proceeding would prejudice the claimant's ability to raise an inconsistent defense in a contemporaneous criminal proceeding." 461 U.S. at 565, 567, 103 S.Ct. at 2012, 2013.

Applying this language to the matter *sub judice* the Court notes that at the time the forfeiture action was filed Tosh's trial had not been held. Other defendants were still at large,[3] and while the chances of apprehending some of the South American defendants seemed remote, defendants who were citizens of the United States may very well yet be apprehended.

The Court concludes that the delay in commencing the forfeiture action is justified by the complexities of this case. As we have noted elsewhere, defendant Tosh embarked on a course of dilatory tactics to avoid trial. He repeatedly changed counsel on the eve of trial and made repeated efforts to retain counsel whom the Court had disqualified following a *Flanagan* hearing[4] at which Tosh refused to waive any possible conflict of interest. F.R.Cr.P 44(c).

The Court therefore finds that the motion of the defendants for return of the seized property should be denied and that the currency should be forfeited to the United States.

The foregoing memorandum constitutes the Court's findings of fact and conclusions of law. F.R.Civ.P. 52(a).

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[3]The Court understands that one fugitive defendant, Joseph Tucker Webb, III, a/k/a "Mike", has recently been apprehended in Florida.

[4]*United States* v. *Flanagan*, 527 F. Supp. 902 (E.D. Pa. 1981), *aff'd*, 679 F.2d 107 (3rd Cir. 1982), *rev'd*, __ U.S. __, 104 S.Ct. 1051 (1984).

An appropriate order has been entered this 16th day of September, 1986.

(s) Thomas A. Ballantine, Jr.
THOMAS A. BALLANTINE, JR.
United States District Judge

Copies to counsel

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 86-6063
No. 86-6064

UNITED STATES OF AMERICA, - - *Plaintiff-Appellee,*

v.

$75,900 IN UNITED STATES CURRENCY;
$8,000 IN UNITED STATES CURRENCY;
and JOHN DOE, - - - - - - - *Defendants,*
JAMES W. RAGLAND; MONA RAGLAND;
LARRY SUDDETH, and MULHALL,
TURNER, HOFFMAN and TRIPLETT, - - *Defendants,*
Non-Party Appellants.

On Appeal from the United States District Court
For the Western District of Kentucky

OPINION—Filed December 14, 1987

BEFORE: KEITH, JONES and MILBURN, Circuit Judges.

PER CURIAM. Appellants James W. Ragland, Mona Ragland, and Larry Suddeth appeal from the district court ordering forfeiture of currency seized during the course of a narcotics investigation. For the reasons that follow, we affirm.

I.

On March 1, 1982, two state search warrants were executed on the homes of James and Mona Ragland on Lynn

Station Road and Larry Suddeth on Thelma Lane in Louisville, Kentucky. A safety deposit box key numbered 509 was seized from the Ragland residence, and a key numbered 386 was seized from the Suddeth residence.

On March 3, 1982, federal search warrants were executed on the safety deposit boxes. Box number 509 contained $75,900.00 in United States curency; box number 389 contained $8,000.00 in United States currency.

On April 27, 1982, appellants and twenty-seven other defendants were indicted on charges of conspiracy to distribute cocaine and marijuana. Appellants pleaded guilty on May 16, 1983. Nevertheless, the seized currency played a role in the trials of several other defendants. It was admitted at the trial of codefendant John Atnip in May 1983. At the trial, a government witness testified that money generated by the conspiracy was packaged in stacks and stored in safety deposit boxes. The currency was also expected to be used at the trial of defendant Jerry Tosh, which did not occur until May 1985.

State and federal forfeiture proceedings have been initiated as a result of the searches. Currency found in various briefcases during the execution of the state warrants are the subject of state forfeiture proceedings. Civil forfeiture proceedings against the currency found in safety deposit boxes numbered 386 and 509 are the product of a tortured procedural history.

On July 7, 1982, Larry Suddeth filed a motion to suppress and for return of evidence pursuant to Rule 41, Federal Rules of Criminal Procedure. He sought return of property seized from his residence and from safety deposit box number 386.

On August 30, 1982, the district court ruled that all motions would be treated as though made on behalf of all defendants. On the same date, Suddeth's motion to suppress was denied.

On May 3, 1984, appellants filed a renewed motion for returns of the seized property and a request for hearing. The motion was denied by order entered June 4, 1984.

On July 12, 1984, the United States filed a complaint for forfeiture of the $75,900.00 found in safety deposit box number 509. *United States* v. *$75,900 in United States Currency,* No. C-84-0735-L(B) (W.D. Ky. 1984). Forfeiture proceedings against the $8,000.00 found in safety deposit box number 386 were initiated on October 12, 1984. *United States* v. *$8,000.00 in United States Currency,* No. C-84-1660-L(A) (W.D. Ky. 1984).

In *United States* v. *$75,000.00,* appellants filed a motion to dismiss on the ground that the government had unreasonably delayed in prosecuting the forfeiture action. The motion was denied by the district court on January 21, 1985.

On October 10, 1985, this court considered appellant's appeal from the district court's order of June 4, 1984, denying their motion for return of property under Rule 41(e), Federal Rules of Criminal Procedure. We directed a remand for consideration of appellants' claim in light of the Supreme Court's decision in *United States* v. *Eight Thousand Eight Hundred & Fifty Dollars ($8,850) in United States Currency,* 461 U.S. 555 (1983).

On October 16, 1985, the district court granted the government's motion for summary judgment in both civil forfeiture proceedings. On September 16, 1986, the district court, acting pursuant to the remand, entered orders in the civil forfeiture proceedings and the criminal proceeding in which is concluded that the government had not delayed unreasonably in initiating forfeiture proceedings. Defendants now appeal, alleging that the judgment of the district court is in error.[1]

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[1]Defendants argue that the judgment of the district court cannot be upheld because the court failed to comply with this court's

(Continued on next page.)

II.

In *United States* v. *Eight Thousand Eight Hundred & Fifty Dollars ($8,850) in United States Currency*, 461 U.S. 555 (1983), the Court held that a claimant's right to due process may be violated by unreasonable delay in the initiation of civil forfeiture proceedings. *Id.; see generally* D. Smith, *Prosecution & Defense of Forfeiture Cases* paragraph 12.01, at 12-2 (1986). Four factors are relevant in making this determination:

(1) the length of delay;
(2) the reason for the delay;
(3) the claimant's assertion of a right to a judicial determination of his interest in the property; and
(4) prejudice to the claimant.

In the present case, approximately twenty-nine months elapsed between the seizure and the initiation of forfeiture proceedings. We conclude that delay of this length is sufficient to trigger inquiry into the remaining factors. *See $8,850*, 461 U.S. at 565 (eighteen-month delay sufficient to trigger inquiry into remaining factors); *United States* v. *Forty-Seven Thousand Nine Hundred Eighty Dollars ($47,980) in Canadian Currency*, 804 F.2d 1085, 1088-89 (9th Cir. 1986) (fourteen-month delay sufficient to trigger inquiry into remaining factors), *cert. denied*, 107 S.Ct. 2469 (1987).

The second relevant factor is the reason for delay. Cases decided in the aftermath of *$8,850* have consistently recognized that pending criminal proceedings may justify

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(Continued from preceding page.)

order to precisely delineate the property that was subject to forfeiture. On remand, the district court ordered forfeiture only of the currency found in the safety deposit boxes. Thus, we reject defendants' argument that a remand for clarification is in order.

delay in the initiation of civil forfeiture proceedings. For example, in *United States* v. *United States Treasury Bills Totaling $160,916.25,* 750 F.2d 900 (11th Cir. 1985) (per curiam), Georgia Bureau of Investigation officials seized currency from an airplane crash on November 7, 1980. Following the crash, Georgia and federal officials began a narcotics investigation which culminated in December 1981 with the conviction of eleven defendants.

In January 1982, the government initiated forfeiture proceedings against the currency. Claimant Sun Bank of Miami, as representative of the estate of one of the passengers killed in the crash, argued that the government unreasonably delayed initiation of the forfeiture proceeding. The court rejected this argument.

> In *United States* v. *$8,850,* the Supreme Court held that diligent pursuit of pending criminal proceedings presents strong reasons for delay in instituting civil forfeiture proceedings.
>
> The district court determined that these considerations were significant in this case. The court noted the period between November 1980 and January 1982 was consumed with conducting a massive criminal investigation and prosecution of the very criminal activity that generated the funds. Moreover, there is nothing to indicate that the Government's investigation and subsequent criminal case was not pursued with diligence.

750 F.2d at 902. In the present case, as in *Treasury Bills,* the delay was caused by "a massive criminal investigation and prosecution of the very criminal activity that generated the funds." *Id.* Accordingly, we agree with the district court that the delay in the present case was justified.

The third factor, which focuses on the claimant's assertion of a right to the property, weighs against the govern-

ment in the present case. Appellants filed motions for return of the seized property. This constitutes an assertion of a right to a judicial determination within the meaning of *$8,850.* 461 U.S. at 568-69

The final factor in the analysis is prejudice to the claimant. In *$8,850,* the Court noted that "[t]he primary inquiry here is whether the delay has hampered the claimant in presenting a defense on the merits, through, for example, the loss of witnesses or other important evidence. Such prejudice could be a weighty factor indicating that the delay was unreasonable." 461 U.S. at 569. In the present case, no such prejudice has been shown. Thus, evaluation of this factor supports the decision of the district court. *See $8,850,* 461 U.S. at 569-70; *Treasury Bills,* 750 F.2d at 902; *United States* v. *One 1954 Rolls Royce Silver Dawn,* 777 F.2d 1358, 1362 (9th Cir. 1985).

In the final analysis, we conclude that claimants' assertion of their rights in the seized currency is outweighed by the justification for delay occasioned by the ongoing criminal investigation and the absence of prejudice to the claimants. Thus, we find no error in the judgment of forfeiture.

III.

The judgment of the district court ordering forfeiture of the $75,900.00 found in safety deposit box number 509 and the $8,000.00 found in box number 389 is AFFIRMED.

JEFFERSON CIRCUIT COURT

TWELFTH DIVISION

No. 84CI 00406

E. G. HELM, JR., in his official capacity as Chief of the Jefferson County, Kentucky Police Department - - - - *Plaintiff*

v.

ONE HUNDRED NINETY-THREE THOUSAND THREE HUNDRED EIGHTY-SEVEN DOLLARS AND SIXTY-SEVEN CENTS ($197,387.67) - *Defendant*

ORDER—Entered March 14, 1984

This case came on for a trial March 12, 1984 on plaintiff's action to forfeit certain cash pursuant to KRS 218A.270. The plaintiff was represented by the Honorable William T. Warner. The only defendant who answered or appeared was the Honorable Charles Turner appearing for G. Murray Turner, assignee of James W. Ragland, and the Honorable Michael Spalding, Assistant U. S. Attorney, who appeared on behalf of the Internal Revenue Service.

The plaintiff announced ready but the defendant, Turner, advised the Court that he desired to have the case reassigned in order that G. Murray Turner could appear; the latter being in trial in another case. All parties present then agreed that this case may proceed to hearing reserving ruling on any interest in the money, if any, claimed by G. Murray Turner, assignee of James Ragland and the United States of America (Internal Revenue Service). All parties being in agreement, the Court sustained the Motion to proceed with the hearing.

FINDINGS OF FACT

On March 1, 1982, Jefferson County Detective, Gary Epperson, executed a search warrant on real estate located at 8105 Thelma Lane and also at 9110 Linn Station Road, also of Jefferson County, Kentucky. This search was the culmination of an investigative effort conducted by the Kentucky State Police, the Jefferson County Police Department and other authorities which had begun in the latter part of 1981.

The investigation, conducted by Gary Epperson, disclosed that there was a drug operation which worked interstate. Drugs (cocaine and marijuana) were sent to Kentucky on consignment from Florida to Mr. James Ragland and his friends. These drugs would be distributed by Mr. Ragland to others who would retail them to persons on the street. When the drugs were purchased, the money would then flow back through the retailers to Mr. Ragland, who in turn would forward the money to his contacts in Florida. The investigation showed that Ragland used several briefcases to carry the money. The money would be a bundle in $1,000 packages and then the $1,000 packages would in turn be bundled together to make a package of $5,000. This money was wrapped in this fashion apparently to facilitate transfer. The investigation showed that Mr. Ragland's operation was conducted out of the residences located on Thelma Lane and Linn Station Road.

The investigation further showed that the operation had been conducted over a period of two (2) years and had grossed somewhere in the neighborhood of $3,000,000 or $4,000,000.

On the morning of the search, the police made entry by warrant to the address at 8105 Thelma Lane. At that location, the officers found the following:

1. A briefcase containing $115,000. Packages were wrapped first in $1,000 bundles and then in $5,000 packages. The briefcase had a combination lock and it was found underneath a bed in the bedroom occupied by Ragland's sister and her boyfriend, Larry Suddeth. Underneath the same bed, there was another identical briefcase which contained $39,480. This was wrapped similarly to the money wrapped in the first briefcase.

2. An additional $21,876 was found in a dresser drawer in the same room. Mixed with this money, there were receipts for a gun and travel receipts indicating travel from Jefferson County to Florida.

3. In the same dresser, the police found $215.00 in loose cash; $464 in Mr. Suddeth's wallet and $24.67 (coins) in a bank bag located in an adjacent room.

The total sum found at this address was $220,579.67.

In an adjacent room, the police discovered six (6) pounds of 99% pure cocaine and five-hundred (500) pounds of marijuana. There were plastic bags and also a large box of manitol which is commonly used to dilute cocaine.

On the same day, a search warrant was executed by Detective Gary Epperson and others on the premises known as 9110 Linn Station Road which was occupied by one Billy Ragland and Mona Ragland, his wife. In the execution of the search warrant, many records concerning the drug operation were seized and also the following cash:

1. In Mona Ragland's purse, the sum of $1,292.

2. On a nightstand in the bedroom, numerous bills in denominations of 20's, 10's, 5's and others totaling $8,600.

3. In the chest of drawers in the bedroom which contained a blue book and powder identified as cocaine together with cash in the sum of $986.

4. In Ragland's blue jeans in the bedroom, the sum of $2,500.

The total sum found at this address was $13,588.00.

On the same day of the searches as set out above, the Jefferson County Police had under surveillance a vehicle that was operated by one Robert Lyon. This automobile had been seen at the Thelma Lane address, had come out of the garage where certain drugs were found and was stopped by the police pursuant to the search warrant. Upon searching the vehicle, 150 pounds of marijuana was found in the trunk of the car together with one-quarter ounce of cocaine and the sum of $2,740 in cash. This sum is a subject of the forfeiture action.

The Court finds that on March 1, 1982, the Jefferson County Police Department seized monies acquired from transactions involving control substances, including cocaine, which were being dispensed and distributed through the locations known as 8105 Thelma Lane and 9110 Linn Station Road located in Jefferson County, Kentucky.

The Court further finds that these monies were found upon the person and premises of the defendants, James W. Ragland, Billy Ragland, Mona Ragland, Larry Suddeth, Robin Ragland and Robert Lyons, all persons involved in transactions with controlled substances proscribed per KRS 218A.270.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the persons and property including the $197,387.67 herein. (KRS 218A.-270)(F)

2. That the $197,387.67 was seized by the Jefferson County Police Department, a law enforcement agency, upon process issued by this Court having jurisdiction over the property. (KRS 218A.270)

3. That the total sum of $197,387.67 seized by the Jefferson County Police from the premises at 8105 Thelma Lane and 9110 Linn Station Road and from the person of Robert Lyon should be forfeited pursuant to KRS 218A.270

subject however, to any interest if any therein by G. Murray Turner, as assignee of James William Ragland and Mona F. Ragland, and any interest claimed in said money by the United States of America.

ORDER

1. The sum of $197,387.67 seized by the Jefferson County Police on March 1, 1982, be and the same is hereby forfeited to the Commonwealth of Kentucky pursuant to KRS 218A.270, subject to any interest in said property as may be held by G. Murray Turner, assignee of James William and Mona F. Ragland, and by the United States of America (Internal Revenue Service).

2. This matter is set down for a hearing before the Court, without a jury, on May 17, 1984, at 10:00 a.m. to determine what interest, if any, that G. Murray Turner and/or the United States of America may have in the $197,387.67.

(s) Edwin A. Schroering
EDWIN A. SCHROERING, JR., Judge
Jefferson Circuit Court, 12th Division

Copy To:

William T. Warner
Charles Turner/G. Murray Turner
Michael Spalding

AMENDED ORDER—Entered May 8, 1984

The Order entered March 14, 1984 herein is hereby set aside, and the following entered and substituted for the same:

1. The sum of $193,387.67 seized by the Jefferson County Police on March 1, 1982, be and the same is hereby forfeited to the Jefferson County, Kentucky Police Department pursuant to KRS 218A.270, subject to any interest in said property as may be held by G. Murray Turner, assignee of James William and Mona F. Ragland, and by the United States of America (Internal Revenue Service).

2. This matter is set down for a hearing before the Court, without a jury, on May 17, 1984, at 10:00 a.m. to determine what interest, if any, that G. Murray Turner and/or the United States of America may have in the $193,387.67.

3. This Order shall have no effect upon the rights of the United States of America (Internal Revenue Service) or G. Murray Turner, assignee of James William Ragland and Mona F. Ragland, his wife, and Larry Suddeth.

(s) Edwin A. Schroering
EDWIN A. SCHROERING, JR., Judge

Copy To:

William T. Warner
Michael Spalding
G. Murray Turner

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. C 84-1271-L(B)

BOBBY CROUCH, Et Al. - - - - - *Plaintiffs*

v.

ONE HUNDRED NINETY-THREE THOUSAND THREE HUNDRED EIGHTY-SEVEN DOLLARS AND SIXTY-SEVEN CENTS, Et Al. - - *Defendants*

ORDER—Entered June 7, 1988

For the reasons set forth in the memorandum filed this date,

IT IS ORDERED that the title to $193,387.67, properly seized by the Jefferson County Police on March 1, 1982, is vested in Bobby Crouch, Chief of the Jefferson County Police, and the claims of the United States (IRS) and G. Murray Turner be and they hereby are dismissed with prejudice.

There is no just reason for delay, and this is a final and appealable order.

This 7th day of June, 1988.

(s) Thomas A. Ballantine, Jr.
THOMAS A. BALLANTINE, JR.
United States District Judge

Copies to counsel

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. C 84-1271-L(B)

BOBBY CROUCH et al. - - - - - *Plaintiffs*

v.

ONE HUNDRED NINETY-THREE THOUSAND THREE HUNDRED EIGHTY-SEVEN DOLLARS AND SIXTY-SEVEN CENTS, et al. - - *Defendants*

MEMORANDUM—Entered June 7, 1988

On January 17, 1984, E.G. Helm, Jr.,[1] formerly the Chief of the Jefferson County Police Department, filed this action in Jefferson Circuit Court for forfeiture under KRS 218A.270.[2] The sum of $193,387.67 was seized when the criminal defendants were arrested on March 1, 1982, on drug trafficking charges. Shortly thereafter while the defendants were incarcerated, the defendants William and Mona Ragland signed a document entitled "assignment," purportedly assigning all of their rights, title and interest to funds totalling $306,278.00 to the law firm of G. Murray Turner.

In March, 1984, the Internal Revenue Service intervened, and on March 12, 1984, after a bench trial, Jefferson

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[1]Bobby Crouch, the present Chief of Police, has been substituted as plaintiff.

[2]Repealed effective July 13, 1984. KRS 218A.410, with similar provisions, was enacted in its place.

Circuit Judge Edwin Schroering, Jr., entered findings of fact and concluded that the sum of $197,387.67 had been forfeited to the Jefferson County Police, "subject to any interest in said property as may be held by G. Murray Turner, assignee of James William and Mona F. Ragland, and by the United States of America (Internal Revenue Service)." The matter was set for a hearing to determine what interest, if any, that Turner or the IRS may have. That hearing was never concluded, however, as the case was removed to this Court by the United States (I.R.S.) on December 27, 1984.

On April 1, 1988, after holding a conference with the parties, the Court issued a memorandum and order directing the parties to address the following issues:

1. Whether the Kentucky forfeiture statute, KRS 218A.270(1)(f), or the federal forfeiture statute, Title 21 U.S.C § 881(a)(6), is applicable.

2. Whether any order or judgment of the Jefferson Circuit Court prior to removal is res judicata.

3. The order of priority of the claims of Turner and the Jefferson County Police Chief.

4. The order of priority of the claims of Turner and the Internal Revenue Service.

5. The validity of the assignment by James W. Ragland to Turner.

Turner is the only party who has not filed a memorandum. The IRS concedes that Title 26 U.S.C. § 6323(i)(3) of the Internal Revenue Code creates an absolute priority in favor of the County Police Chief, Bobby Crouch, as against the federal tax lien.

> "(3) Forfeitures.—For purposes of this subchapter, a forfeiture under local law of property seized by a law enforcement agency of a State, county, or other

> local government subdivision shall relate back to the time of seizure, except that this paragraph shall not apply to the extent that under local law the holder of an intervening claim or interest would have priority over the interest of the State, county or other local government subdivision in the property."

The IRS concedes that "should the Court hold that the funds were properly forfeited to the Jefferson County Police Chief under Kentucky law, and that the Jefferson County Police Chief has priority over Turner in those funds, the case is over. The United States claims no priority in these funds as against the plaintiff [Crouch]." (Memorandum of United States, p. 2.)

An assignee takes only the interest of his assignor. *Whayne Supply Co. Inc.* v. *Morgan Construction Co., Inc.*, Ky., 440 S.W. 2d 779 (1969); *United States* v. *$11,580.00 in U.S. Currency,* 454 F.Supp. 376 (M.D. Fla. 1978). It is undisputed that the assignment, or security interest, whichever it may be determined to be, occurred after the seizure of the property while the criminal defendants were incarcerated. The leading case of *United States* v. *Stowell,* 133 U.S. 1, 10 S.Ct. 244, 247 (1980), is dispositive:

> "The next question to be determined is from what time the forfeiture takes effect. By the settled doctrine of this court, whenever a statute enacts that upon the commission of a certain act specific property used in or connected with that act shall be forfeited, the forfeiture takes effect immediately upon the commission of the act; the right to the property then vests in the United States, although their title is not perfected until judicial condemnation; the forfeiture constitutes a statutory transfer of the right to the United States at the time the offense is committed; and the condemnation, when obtained, relates back to that time, and

> avoids all intermediate sales and alienations, even to purchasers in good faith."

In *United States* v. *One 1975 Chevrolet, Etc.*, 495 F. Supp. 737 (W.D. Mich. 1980), *Stowell* was cited with approval. That case involved facts similar to the one before this Court, in that the criminal defendant attempted to make an assignment of his previously seized Blazer truck to his attorney after his arrest, for "past legal services and future legal services." The Court quoted *Stowell* and held the Blazer to have been forfeited at the time it was improperly used. See also *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 94 S.Ct. 2080 (1974); *Simons v. United States*, 541 F.2d 1351 (9th Cir. 1976); *State of Texas* v. *Donoghue*, 302 U.S. 284, 290 58 S.Ct. 192, 195 (1937) (Cardozo, J. dissenting).

> Forfeiture of conveyances that have been used—and may be used again—in violation of the narcotics laws fosters the purposes served by the underlying criminal statutes, both by preventing further illicit use of the conveyance and by imposing an economic penalty, thereby rendering illegal behavior unprofitable.

Calero-Toledo, 418 U.S. at 686, 94 S.Ct. at 2093-2094.[3]

It is apparent, therefore, that the money had been properly forfeited and seized prior to the "assignment" to Turner, and that the criminal defendant then had no funds to assign, under *Stowell, supra.*

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[3]There is some authority which mitigates the harshness of the *Stowell* rule by holding that title is transferred to the government at the time of seizure instead of the time of forfeiture. *State of Idaho* v. *One 1974 Green Targa Porsche Automobile*, 112 Idaho 432, 732 P. 2d 670 (1986).

As for the issue suggested by Turner, dealing with the *res judicata* effect of Judge Schroering's opinion on March 14, 1984, and May 8, 1984, Title 28 U.S.C. § 1450 provides, in pertinent part, that "[A]ll injunctions, orders, and other proceedings had in such action prior to removal shall remain in full force and effect until dissolved or modified by the district court." The federal court "takes the case up where the state court left off." *Granny Goose Foods, Inc.* v. *Brotherhood of Teamsters and Auto TruckDrivers,* 415 U.S. 423, 94 S.Ct. 1113, 1122 (1974), quoting from *Duncan* v. *Gegan,* 101 U.S. 810, 812, 25 L.Ed. 875 (1880). Once a case has been removed, federal law governs the future proceedings. *Granny Goose, supra.*

Because the IRS concedes that it has no interest in the money as against a valid state forfeiture, it is unnecessary to resolve the 3-way dispute by discussing priorities, filing, and notice requirements, which the United States and Bobby Crouch have addressed briefly in their memoranda.

It is the holding of this Court that all interest in the funds were vested in the Chief of the Jefferson County Police prior to the execution of the agreement between Turner and the Raglands.

An appropriate order has been entered this 7th day of June, 1988.

(s) Thomas A. Ballantine, Jr.
THOMAS A. BALLANTINE, JR.
United States District Judge

Copies to counsel